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IN THE

Supreme Court of the United States

October Term, 1965
No. 965

GEORGE KOHATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner respectfully submits this reply brief in support of his petition for a writ of certiorari herein.

Argument.

Initially, it should be noted that the brief of the United States in opposition to the petition for a writ of certiorari herein does not deny the great theoretical and practical importance of the question raised by petitioner—the applicability of *Escobedo v. Illinois,* 374 U.S. 378 (1964), in criminal tax fraud investigations. The brief of the United States is devoted exclusively to the argument that petitioner's constitutional claim is unmeritorious. Petitioner respectfully submits that the importance of this constitutional claim warrants the granting of his petition, after which the "merits" of the claim may be argued more thoroughly by both petitioner and the United States.

As to the substance of the United States' argument, it contains the same essential defect as the opinion of the court below in this case—a failure to apply the *Escobedo* doctrine realistically in light of the special nature of criminal tax investigations. The United States appears to have taken the position, as did the court below, that *Escobedo* is "plainly distinguishable" from this case because petitioner had not been arrested, taken into custody or indicted when he made incriminating statements and produced incriminating documents.[1] (U.S. Br. pp. 4-5.) Although asserting the need for arrest, custody or indictment in order for the right to counsel to attach in a criminal tax investigation, the brief of the United States is utterly devoid of *reasons* why these factors should be deemed of constitutional significance. Petitioner, on the other hand, has attempted to demonstrate that these artificial requirements, whatever their applicability as to other types of crime, would leave the *taxpayer* subject to criminal investigation without an effective right to counsel at the stage of the proceeding when the aid of counsel is most critical to him. (See Pet. pp. 15-24.)

It is important to note that this failure to work out a reasonable interpretation of *Escobedo* as applied in criminal tax cases is reflected in the position taken by the Internal Revenue Service, as stated in letters from its Chief Counsel to the author of a recent law review

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[1]The United States also purports to distinguish *Escobedo* on the ground that the police in that case denied defendant's request to consult with his attorney. (U.S. Br., p. 4) While petitioner emphatically denies the need for such a request, he is informed that this issue has been thoroughly argued in cases presently before this Court (*e.g., Vignera v. New York*, No. 760) and therefore will not argue the point in this brief.

Comment.[2] The position of the Service contained in these letters is that investigating agents have *no duty* to warn a taxpayer of his right to counsel *at any stage of a criminal tax investigation,* although, as a matter of "administrative desirability" it is "the general practice of the Intelligence Division that a taxpayer be advised in criminal income tax cases of his right to counsel when offered the opportunity to attend an interview with officials of that Division *at the conclusion of the investigation.*"[3] Appendix B p. 3; (Emphasis added.) As to the effect of *Massiah v. United States,* 377 U.S. 201 (1964); and *Escobedo* on the investigative practices of the Internal Revenue Service, its Chief Counsel frankly stated that "we do not believe that the decisions are applicable in the income tax area," and Accordingly, our procedures have not been changed. . . ." (Appendix A p. 8.)

The position of the IRS that *Escobedo* is not "applicable in the income tax area" is nothing less than an abdication of the Service's duty to follow the decisions of this Court as they apply to matters within the Service's jurisdiction. The IRS has arbitrarily seized upon certain factual differences, *e.g.,* the defendant in *Escobedo* was in custody while normally the taxpayer subject to criminal investigation is not, and has purported

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[2]Krohnke, The Constitutional Right to Counsel in Tax Investigations, 33 U. Chi. L. Rev. 134 (1965). Copies of these letters are attached hereto as Appendices A and B, respectively.

[3]In the present case there is no evidence that petitioner was advised of his right to counsel at any stage of the investigation, although petitioner was advised of his privilege against self-incrimination at such an "interview" with Special Agent Lines "at the conclusion of the investigation," *after* goverment investigators had obtained from petitioner virtually all of the incriminating evidence necessary to convict him.

to "distinguish" *Escobedo* from the typical criminal tax case. The significant facts, ignored by the IRS, are that agents of the I.R.S., upon suspecting a taxpayer of fraud, systematically attempt to elicit incriminating evidence from him with a view to a subsequent criminal prosecution without warning the taxpayer of his rights to counsel or to keep silent. Such a taxpayer is the "accused" to the same extent as the defendant in *Escobedo,* and the absence of custody, arrest and indictment is wholly irrelevant to his critical need for counsel during the accusatory stage of the investigation. By allowing the IRS to conduct such investigations without a warning of the rights to counsel and to keep silent, this Court would be placing its judicial imprimatur upon a system whereby the criminal tax fraud trial is indeed "no more than an appeal from the interrogation." (378 U.S. at 487.)

In addition to the supposed "prerequisites" of arrest, custody or indictment discussed above, the United States asserts an additional reason for holding *Escobedo* inapplicable in the present case, namely, that there were no "coercive influences" exercised on petitioner so as to "undermine the free choice guaranteed by the constitutional privilege against self-incrimination." (U.S. Br. p. 5.) The argument seems to be that, despite the plain language of the Court's opinion, *Escobedo* was not really a Sixth Amendment case, and that the true basis of the decision lies in the Fifth Amendment privilege against self-incrimination. From these premises, the Government contends that the warning of the right to counsel is merely a "factor" to be considered in determining whether the defendant's incriminating statements were "voluntarily" made. (See U.S. Br. in *West-*

over v. United States, No. 761, served on petitioner herein.) Petitioner submits that this position cannot be reconciled with the opinion of this Court in *Escobedo.* The Court in that case made no finding that the incriminating statements had been coerced or involuntarily made by the defendant. In fact, the Court did not question the specific holding of the Supreme Court of Illinois that there was "no reason for disturbing the trial court's finding that the confession was voluntary." 28 Ill. 2d 41, 45, 46 (1964). Further, this Court expressly based its decision on the Sixth, not the Fifth, Amendment. (378 U.S. at 491.) The need for protecting criminal defendants from involuntary self-incrimination is admittedly great, and the Fifth Amendment provides that protection. The rationale of *Escobedo,* however, was not to protect the accused from "coercion", but rather was to provide the accused with the advice of counsel at the stage of the proceedings when he is most apt to incriminate himself, so that he may proceed with full ***knowledge*** of his Constitutional rights and privileges. As the Court pointed out in *Escobedo,*

> ". . . no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (378 U.S. at 490.)

Finally, the United States raises the possibility that petitioner may have had the aid of counsel during the investigation herein. (U.S. Br. pp. 6-7.) First, it should be noted that this is the first stage of this entire proceeding at which a representative of the United States has suggested this possibility. There is no testimony in the record indicating that counsel was present at any of the meetings between petitioner and investigating agents, or that petitioner was ever advised by counsel during the investigation. Moreover, the burden is not on petitioner to show that he was not represented by counsel during the investigation. As the California Supreme Court has properly stated, "The prosecution has the burden of showing that the suspect, once the investigation has reached the accusatory stage, was informed of his constitutional rights to counsel and to remain silent at that stage, or that he knowingly and intelligently waived those rights. Waiver cannot be presumed from a silent record . . . the record before us is barren of any evidence that the authorities either informed defendant of his rights or that he waived them." *People v. Furnish*, 63 Adv. Cal. 536, 541 (1965).

Conclusion.

For the foregoing reasons, petitioner respectfully urges this Court to grant his petition for writ of certiorari herein.

Respectfully submitted,

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